United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1192

To be argued by
JERRY L. SIEGEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1192

UNITED STATES OF AMERICA,
Respondent-Appellee,

—against—

RICHARD HUSS and JEFFREY SMILOW,
Petitioners-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT-APPELLEE

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BRIEF OF RESPONDENT-APPELLEE

STATEMENT OF THE CASE

This is an appeal from the opinion and supplemental opinion, dated and filed May 5 and May 13, 1975, respectively, of the Honorable Thomas P. Griesa, United States District Judge, denying petitioners' motion that the U.S. Bureau of Prisons be ordered to supply them with kosher food while they are incarcerated pursuant to a sentence imposed upon their conviction for criminal contempt.

Huss and Smilow were each found guilty of criminal contempt, in violation of 18 U.S.C. § 401 and Rule 42, by a jury in United States District Court on July 16, 1974 for their refusals to testify concerning the fire-bombing of the offices of Sol Hurok in January of 1972.* They were each sentenced to imprisonment for one year. The Court of Appeals affirmed these convictions without opinion on November 27, 1974.

This Court's mandate issued on February 21, 1975, but on March 7, 1975, before the defendants were scheduled to surrender, they made motions both for reduction of

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* Huss and Smilow were first held in civil contempt by Judge Weinfeld pursuant to 28 U.S.C. § 1826(a) when, despite a grant of use-immunity, they refused to answer questions put to them by a grand jury concerning the bombing incident in which one person was killed. Smilow's initial claim that under the free exercise clause of the First Amendment, he was privileged from testifying because to do so would subject him to "divine punishment and ostracism from the Jewish Community" as an informer, was rejected by this Court in Smilow v. United States, 465 F.2d 802, 804 (2nd Cir. 1972). Upon the consent of the Solicitor General, that case was subsequently vacated and remanded to determine whether there had been any illegal electronic surveillance of Smilow, 409 U.S. 944 (1972), and then remanded to the District Court for that determination, 472 F.2d 1193 (2nd Cir. 1973). The order of contempt was then dismissed on the government's motion. In June of 1973, Smilow, again, and Huss were called to testify at the trial of two persons indicted in connection with the bombing for violations of 18 U.S.C. §§ 844(i) and 2, but again refused to testify despite a grant of immunity. On appeal, each defendant claimed that Jewish law "forbids him to testify against a fellow Jew in a non-Jewish court." The Court of Appeals rejected these claims, finding further that they had not been questioned on the basis of illegal electronic surveillance, and affirmed the orders of contempt. United States v. Huss, Smilow, et al., 482 F.2d 38, 51-52 (2nd Cir. 1973). When Huss and Smilow persisted in their refusal to testify, the government was unable to proceed with the criminal indictments and the cases were dismissed. The criminal contempt proceedings against Huss and Smilow were then commenced.

sentence and for the provision to them "of food that is in accordance with the Orthodox Jewish requirements." The surrender date was adjourned until April 4, 1975, and upon the submission of a formal motion on March 27, 1975, an evidentiary hearing on the matter was commenced. Testimony was taken on April 1, 16, 28 and 30, during which time eight witnesses were called by petitioners, three of them on more than one occassion, and four witnesses were called by the government.

On May 5, 1975, Judge Griesa issued a 34-page opinion denying petitioners' motion that they be given kosher food. (J.A. 504) In light of what it felt to be an important ambiguity in that opinion, on May 8, 1975, the government made a detailed oral motion for reconsideration. At the hearing on that motion, the court did much to clarify its opinion, (J.A. 541-362) but directed the government to file within 24 hours a formal written memorandum in support of its motion. The memorandum was filed on May 9 (J.A. 566-87) and on May 13, 1975, Judge Griesa issued a Supplemental Opinion (J.A. 588-595).

Meanwhile, petitioners filed a notice of appeal on May 12 after having been denied an order granting them kosher food pending appeal, by Judge Griesa at the hearing on May 8 (J.A. 596). Petitioner Smilow only thereupon made an application to the Court of Appeals for "an order pending appeal, directing the United States and its officers to make available to him on a regular basis, kosher food that meets Orthodox Jewish requirements." On May 20, 1975, following

argument, the Court of Appeals denied this motion (Mulligan, Timbers, J.J.; Gurfein, J. dissenting). The case was, however, set down to be heard on an expedited basis during the week of June 16, 1975.

A Motion for Injunction Pending Appeal, seeking the same relief, was then submitted to the United States Supreme Court, Justice Marshall sitting as Circuit Justice, on May 22, Docket No. A-967. The motion was submitted by Justice Marshall to the full Court. On June 2, 1975, the motion was denied by the Supreme Court.

THE ISSUES ON APPEAL

1. Is the United States constitutionally required to fully accommodate the religious dietary practices of persons incarcerated in federal penal institutions by providing them with kosher food?

2. Did the District Court properly hold that Richard Huss does not adhere to the kosher dietary laws and in any event is not entitled to be provided with kosher food by the Bureau of Prisons?

3. Did the District Court have jurisdiction over petitioners-appellants and the subject matter of the motion?

STATEMENT OF FACTS

A. The Evidentiary Hearing

1. The Claimed Interference with Petitioners' Religious Practices

On April 1, Jeffrey Smilow testified that he was an Orthodox Jew and that he observed the dietary laws of his religion by eating only kosher food. (J.A. 87-89) While incarcerated for two weeks pursuant to Judge Weinfeld's civil contempt order, petitioner was forced to select permissible food from the regular prison fare. During the second period of incarceration, pursuant to Judge Bauman's civil contempt order, Smilow at first followed the same eating habits as he did on the prior occasion, but during the second week was given pre-packaged frozen kosher dinners consisting of an entree and two vegetables. (J.A. 92)

Smilow testified that he was able to eat, and had in fact eaten, many of the foods regularly available to him at the prison without violating his religious beliefs. These included for example, fruit-juices, dry cereal and milk, bread or toast and butter, lettuce or salad, all fresh fruits and vegetables, coffee, tea, punch, ice cream, and certain pre-packaged cakes available through the canteen. (J.A. 89, 91, 94-102, 104, 478-79) Despite Smilow's claim that under his understanding of Jewish law, one could not eat non-kosher food unless he were "stranded on a rowboat in the middle of the ocean" or "starving to death" (J.A. 107, 108), he testified that he had knowingly eaten non-kosher

food on several occasions while in prison simply because he felt hungry. (J.A. 92, 106)*

The Bureau had attempted to accommodate Smilow's religious dietary practices in two principal respects. First, as Smilow testified the prison had allowed him to use a diet or medical line in the dining room whereby he was able to obtain dietary supplements consisting of hard-boiled eggs, cheeses, and sardines. (J.A. 373-75) While these foods were intermittently made available to him during his earlier periods of incarceration (J.A. 99, 101, 102), Smilow testified on April 30 as Warden Gengler testified earlier, that they were then being made available to him on a regular basis whenever he wanted them. (J.A. 373-75, 481-82)

Second, Smilow was assigned to the kitchen staff, from which flowed a number of consequences: (1) he could on occasion get extra portions of food at the conclusion of the regular prison meal (J.A. 102-103, 375); (2) he could by observation or inquiry determine how foods were prepared and was thus able to eat certain things he otherwise would have thought to be non-kosher and not eaten, (J.A. 95), and (3) he was able to cook his own hot vegetables in a manner which conformed to his religious dietary laws. (J.A. 483-484) Inspite of the fact that assignment to the kitchen enabled Smilow to do these different things in furtherance of his

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*Smilow also conceded that he had not made any attempt to determine from religious authorities whether he would be allowed to eat non-kosher food in view of his impending involuntary confinement (J.A. 109).

of his religious dietary practices, upon his arrival at the Youth Correctional Center in Ashland, Kentucky, on May 22, 1975, when the Bureau again attempted to accommodate him by offering to assign him to work in the kitchen, he refused the offer. (Response of the Solicitor General, at 8).*

The testimony of Richard Huss, revealed that he was in fact non-kosher outside prison and thus suffered no infringement of his religious rights.

2. The Reasons Underlying the Bureau's Policy of Limited Accommodation and Its Decision Not to Provide Kosher Food

Four government witnesses were called to testify, all of whom actually work within the federal prison system, including James Wahl the head of the Food Service for the entire Bureau of Prisons system and Louis Gengler, the warden from one federal detention facility. The testimony of these witnesses revealed the five basic reasons underlying the Bureau's policy.

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* Counsel claimed in a letter to the Supreme Court in response to the Solicitor's Memorandum that "In that his access to the standard diet by way of the food line was unlimited, petitioner saw no advantage to working in prison food service since the availability of foods which he could eat would not be any greater than at present." This answer is clearly unsatisfactory since it fails to explain why petitioner decided to forego the opportunity both to see which foods were prepared in a manner so that he could eat them, and to cook his own food on occasion. Also it should be noted that many of the foods which petitioner can eat from the food line such as salads or vegetables, are routinely available in unlimited quantities, as the Administrator of Food Services for the Bureau of Prisons testified. (J.A. 210-211)

(1) problems of internal order and discipline.

The concern of prison officials was that providing kosher food to particular inmates would be viewed by other inmates as preferential or discriminatory treatment, thereby creating resentment toward both the prison officials and the inmates receiving the food. (J.A. 182, 398-99, 431-33) On one occasion when kosher food was provided to inmates at West Street on an experimental basis, six Black Muslim inmates first angrily threatened the food administrator demanding to know why they were not being provided food in accordance with their religious practices. Shortly thereafter, they attacked and beat the inmate involved, requiring his hospitalization and transfer to another institution. (J.A. 381-82) Even more serious breaches of internal order and discipline were described, including the occupation of the federal penitentiary at Lewisburg by angry inmates complaining of discrimination by prison authorities among religious groups within the prison. (J.A. 383-84)

(2) problems of institutional security.

Prison officials also described the elaborate security precautions taken whenever food supplies were brought into the prison (J.A. 186-87, 377-78) and expressed the fear that contraband such as weapons might be more readily smuggled into the prison when, as in the case of kosher food, a few items known to be intended for a particular and readily-identifiable inmate or group are specially imported into the prison. (J.A. 182, 377-78)

(3) problems of accommodation arising from the multiplicity of religious groups represented in the prison system.

It was felt by prison officials that if the Bureau were required to accommodate the religious dietary practices of Jewish inmates by providing them with kosher food, similar demands would be made by a number of the other religious groups within the federal prison system. (J.A. 383, 401, 431-32, 468-70). In many instances it would be necessary to afford such group similar provisions or risk generating inmate resentment and the possible repetition of incidents such as those involving the Black Muslims at West Street when kosher food was provided previously. (J.A. 381-2) Aside from these concerns about institutional order and discipline, the sheer expense and administrative burden of providing for the dietary practices of the many religious groups within the federal prison system, both well-recognized and more obscure, were felt to preclude any attempt to accommodate the practices of one group alone. (J.A. 188-89)

(4) the financial problems attendant upon the acquisition of fresh as well as frozen kosher foods, the cost of which far exceeds both (1) the cost of non-kosher food (J.A. 172, 174 -178, 180-82), (testimony by appellants' own witnesses showed it to be more than ten times the cost of regular prison fare (J.A. 328-29)), and (2) exceeds the funds allotted the Bureau by Congress for the dietary maintenance of the inmate population. (J.A. 160-66) Any requirement that the Bureau accommodate the needs of other religious group would obviously multiply these financial problems. (J.A. 188-99)

(5) other administrative problems inherent in any effort to provide kosher food to even a few inmates on a daily basis within the prison setting. These would include, depending on the type of food provided, (a) problems of acquisition under the complex rules of the Federal Procurement Act, such as the requirement that the food be acquired by a solicitation and bidding process, (J.A. 48-51, 158-160, 168), (b) problems of transportation in areas such as Ashland, Kentucky where kosher food is not available nearby (J.A. 169-72, 178), (c) problems of storage, preparation (J.A. 116-117, 170-71, 255-57, 485) and service (J.A. 170-71) in light of the particular requirements of the kosher laws, and (d) other administrative burdens such as the hiring and financing of additional personnel to operate the food service and the prison generally, under such circumstances (J.A. 188-89). See generally the discussion of these problems at J.A. 33-55.

Finally, it was shown that appellants could fully exercise their dietary practices in a nutritionally adequate fashion while in prison without the provision of kosher food. Petitioners were able to eat a large number of items available from the regular prison menu (J.A. 89, 91, 94-102, 104, 478-79) and many of these items are routinely made available to inmates in unlimited quantities. (J.A. 210-11) In addition, the prison provided Smilow with dietary supplements of cheese, eggs, and sardines through a special medical diet line in the food service. (J.A. 373-75) The testimony of the nutritionist called by petitioners showed

clearly that a diet consisting of the foods which petitioner could eat through the regular food service when supplemented in the manner described would supply him with a nutritionally sound diet, (J.A. 294) providing him with recommended daily allowances of protein, (J.A. 284-85, 295) iron, (J.A. 302) and calories. (J.A. 286, 303-5) In addition, the Bureau provides vitamin and mineral pills as needed which would satisfy his nutritional requirements in those respects. (J.A. 301-2) Finally, the Bureau had attempted to accommodate petitioners religious dietary needs by assigning him to work in the food service, thereby providing him with opportunities to obtain extra food not normally available in unlimited quantities, (J.A. 102-3, 375) to observe the preparation of foods to see if he could, consistent with his religious practices, eat them, (J.A. 95) and to prepare his own hot foods in a religiously-permitted fashion. (J.A. 483-84)

B. The District Court Opinions

In its opinion of May 5, the District Court found that based on the full record before it and the applicable law that "defendants have no constitutional right to be provided with kosher food during their imprisonment", (J.A. 505) and denied their application. In explaining its decision, the court held that the government had in fact demonstrated the reasons for, and the interests served by, its policy of not providing kosher food to prison inmates so as to constitutionally justify the interference with petitioners' religious rights resulting from this policy.

After first discussing the origins and the substance of the kosher dietary laws and practices (J.A. 508-13), the court took note of the Bureau of Prisons' policy of accommodating the religious needs of the inmates as fully as possible within the limitations made necessary by the realities and requirements of penal institutions,* and described some of the ways in which the Bureau had in fact provided for the inmates' religious needs, (J.A. 513-17) including those of petitioners herein. (J.A. 514-17)**

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* See Bureau of Prisons Policy Statement 7300.43B (June 27, 1973), entitled "Religious Beliefs and Practices of Committed Offenders," infra at 12,19.

** These include provision for the employment of prison chaplains and rabbis on a part or full-time basis, the use of volunteer lay and clergymen, the provision of religious services, instruction, and counseling, and the use of prayer books, phylacteries and other liturgical apparel. (J.A. 155-56, 385-98, 445-75) With respect to the religious dietary practices of inmates, the court noted the Bureau's policy that:

> "A committed offender may abstain from eating those food items, served to the general population, which are prohibited by the religion of the resident. The committed offender may receive added portions of non-rationed food items, from the main serving line, which in no way cause a violation of the restrictions of the faith professed by the committed offender. Ordinarily, the practical problems of institutional administration must be primary in arranging for the observance of religious holidays, sacraments, celebrations, diets, and the like." Policy Statement 7300.43B (4)(f)(1).

The court also noted the special provisions made for the celebration of sacramental rituals and religious holidays, including Passover, and the food requirements thereof. (J.A. 371-73) See Policy Statement 7300.43B (4)(f)(2).

The court then laid out the factual findings upon which it found the Bureau's policy to be constitutionally justified. These included: (1) the financial considerations of both the Congressional appropriation of an average of $1.38 to feed each inmate three meals per day (J.A. 517, 523, 536) as well as the high cost of kosher food. The court found that a frozen kosher meal consisting of an entree and two vegetables costs $4.50 or $5.00 in New York and between $2.50 and $3.50 in Ashland, Kentucky, where petitioners were to be, and are now, incarcerated, whereas the average cost of a similar serving of regular prison fare was only $.30 (J.A. 521-22). (2) The court next noted the problems resulting from the fact that if the dietary rules of one religion were accommodated, it might be necessary to accommodate those of all other religious groups within the prison (J.A. 519, 523, 536). The court particularly noted the violent incident involving Black Muslim prisoners which occurred when a Jewish inmate was provided kosher food on a "trial" basis, and observed that the incident "illustrates the point that in a volatile prison atomsphere differences in treatment are inevitably potential sources of danger." (J.A. 522).

(3) Developing the problem of maintaining internal order and discipline, the court discussed at length the policy of not according special treatment to particular prisoners. As the court noted, "Such special treatment has the potential of causing hostility and harm to the favored

ones, as well as causing discipline problems to the prison as a whole." (J.A. 524) The court was careful to note the Bureau's distinction between occasionally providing special treatment, as in the provision of traditional meals on yearly religious holidays, such as Passover or Ramadan, and the regular provision of special meals to religious groups. (J.A. 524, 536) (4) The court also noted the security problems created when "items purchased by the prison are known to be destined to a particular prisoner or group of prisoners". (J.A. 525) (5) Finally, the court noted the various administrative problems involved in providing kosher food as described in a letter by Norman Carlson, Director of the Bureau of Prisons, from which the court quoted. (J. A. 519)

The court next went on to note the efforts made by the Bureau to accommodate on a more limited basis the religious practices of petitioners, including (1) their assignment to kitchen duty both to enable them to "obtain extra foods of the kind not forbidden," (J.A. 528) and so that they could prepare their own foods in a religiously permissible fashion (J. A. 528), and (2) the regular provision of dietary supplements and added portions of religiously permissible foods, of which the court found, there were many (J. A. 525-26). With respect to this latter alternative, the court found that a diet supplemented as described "would provide an adequate diet," (J.A. 526) and that vitamin and

mineral pills are made available by the Bureau, if needed. (J.A. 526) The court concluded this analysis finding that:

> "[T]he important point is that the prison officials have demonstrated a willingness to afford an Orthodox Jew every reasonable assistance in obtaining adequate food within his religious laws." (J.A. 528)

Finally, the court examined two alternative possibilities for providing inmates with kosher food but found that (1) it lacked authority to order that petitioners be confined in New York where kosher food is more readily available (J.A. 537), and that there were important penological considerations involved in the Bureau's decision that they be sent to the Youth Correctional Facility at Ashland, Kentucky (J.A. 520-21), and (2) the court noted that many of the problems of internal order, disclipine, and security would be exacerbated if particular inmates were allowed to purchase their own special food. (J.A. 523-24)

In light of this extensive factual record, the court then turned its attention to the legal considerations which were ultimately to govern its analysis of the facts and hence its decision in the case. The substance and the propriety of its constitutional analysis is discussed in detail infra at 21-34. After surveying the relevant case law (J. A. 525-35), the court declined to apply the compelling state interest test, in particular, and without adopting an explicit standard concluded:

> "[T]he Bureau of Prisons is entirely correct in refusing to purchase special food for one group of prisoners, which is distinctive in

> quality and far more expensive than the food issued to prisoners in general. It is clear that this cannot be done for one group without making the same provision for other groups who demand their special privileges. I am also persuaded that it would be contrary to good order and discipline to permit one group of prisoners, or organizations supporting them, to pay for their more expensive, special food. In addition, the security problems referred to by the Bureau of Prisons cannot be overlooked. (J.A. 536)

Because of the uncertainty on the government's part as to what constitutional standard the court had in fact applied, or whether it had merely enunciated a statement of the respective burdens of proof of the parties in suits challenging prison regulations on First Amendment grounds, the government first orally (J.A. 546-62), and then in a written memorandum of law (J.A. 565-87), formally requested reconsideration of the court's decision. On May 13, the court issued a Supplemental Opinion (J.A. 588-95) which, after articulating the constitutional issues involved, discussed infra at 30-34, reaffirmed its initial determination that under the standards enunciated by the Supreme Court in Pell v. Procunier, 417 U.S. 817 (1974) and Procunier v. Martinez, 416 U.S. 396 (1974), as qualified by the court (J.A. 59-93), the government had demonstrated a sufficient constitutional justification for its policy so that petitioners were not in fact entitled to kosher food while in prison (J.A. 593-94).

ARGUMENT

The question before this Court in this case is whether the United States is constitutionally required under the First and Eighth Amendments to fully accommodate the religious dietary practices of inmates incarcerated in federal penal instituions. In this case, the inmates in question are Jewish and hence seek kosher food on a daily basis.

The government must respectfully disagree with appellants' suggestion that somehow "This case presents no refined issues of prisoners' rights of the kind involved in Martinez and Pell," (Appellants' Brief at 20) both of which involved prison regulations infringing upon the First Amendment rights of prison inmates. In fact, this case involves precisely such refined issues, and hence requires particularly careful scrutiny of the Supreme Court's decisions and direction in each of those cases handed down only last term. This case does not involve, as counsel would have this Court believe, an attempt by the United States "to compel religious violations...by the very cruel means of

exploiting a human being's hunger pangs," (Appellants' Brief at 21) nor does it present for this Court's decision the very broad question appellants suggest of whether "any bona fide religious practice of prison inmates is protected by the First Amendment." (Appellants' Brief at 21) Rather it involves precisely the "refined issues" raised by the competing demands of the free exercise clause of the First Amendment and the important and substantial state interests served by and necessary for the proper functioning of this society's penal institutions. While it is unquestioned that courts must and should "discharge their duty to protect constitutional rights," Procunier v. Martinez, supra, at 405-406, the important state interests served by present governmental policies regarding prison inmates should never be thought of as "minor practical problems" nor as "picayune," (Appellants Brief at 20) and to so construe them is to do substantial disservice both to those interests, to the penal institutions themselves, and hence to society at large.

POINT I

THE UNITED STATES IS NOT CONSTITUTIONALLY REQUIRED TO FULLY ACCOMMODATE THE RELIGIOUS DIETARY PRACTICES OF PERSONS INCARCERATED IN FEDERAL PENAL INSTITUTIONS

It is the policy of the Bureau of Prisons to:

> "extend to committed offenders the greatest amount of freedom of, and opportunity for pursuing, individual religious beliefs and practices as is consonant with the Bureau of Prisons mission -- the correction of the committed offender. This must be accomplished within the context of the requirements of maintaining security, safety, and orderly conditions in the institution." Bureau of Prisons Policy Statement 7300.43B

In light of this broad policy, the task of this Court must be to scrutinize the particular practice in question on the basis of the record in this case and the Supreme Court's clear direction in Pell v. Procunier, 417 U.S. 817 (1974) that:

> "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." 417 U.S., at 822.

Neither the First Amendment, the Eighth Amendment, nor indeed any other constitutional provision requires the government to accommodate fully the religious dietary practices of federal prison inmates in this case by the provision of kosher food.

By its policy, quoted above, the Bureau has not and does not seek to deny nor interfere with appellants' right or ability to follow their religious dietary practices. Indeed, to that end, the Bureau has taken a number of steps to facilitate and to accommodate appellants' observance of their religious practices, such as by the work assignments previously described. As the record in this case convincingly demonstrates, irrespective of the Bureau's efforts to accommodate petitioners' religious practices, there are important and substantial institutional concerns which compel the conclusion that the Bureau cannot and should not be required to provide kosher food to particular inmates on a regular basis. These interests include the preservation of internal order and discipline, institutional financial and administrative burdens, and the constitutional and practical reasons why all inmate religious dietary practices would then have to be accommodated, all of which are interests which the Supreme Court in Pell, particularly, and Martinez, indicated are to be weighed heavily by the courts when engaged in the constitutional balancing process.

Aside from the clear and constitutionally sufficient justification for the Bureau's policy of limited accommodation,

the government has also shown that appellants can fully exercise their dietary practices in a nutritionally adequate fashion while in prison without being provided kosher food.

A. The Constitutional Standard

There can be no question but that were this Court called upon to judge governmental activity which was claimed to infringe upon a citizen's right to the free exercise of his religion in a setting outside the prison walls, the government would be required to demonstrate (a) that such a limitation or interference as was found to actually result from such activity was justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate," and (b) that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Sherbert v. Verner, 374 U.S. 398, 403-407 (1963). Similarly, there is no question but that the obligation of an Orthodox Jew to eat only kosher food is a religious practice protected by the free exercise clause of the First Amendment. Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y.), aff'd _____ U.S. _____ (1974), as are the dietary requirements of other religions, Ross v. Blackledge, 477 F.2d 616 (4th Cir. 1973).

However, in light of the Supreme Court's decisions last term in Procunier v. Martinez, 416 U.S. 396 (1974) and Pell v. Procunier, 417 U.S. 817 (1974), it is now abundantly clear that a different constitutional standard must be applied when analyzing First Amendment challenges in the prison setting. Nonetheless, it is not the semantics

employed by the Supreme Court in articulating the standard to be applied which is the lesson of those decisions but the fact that, as the Court has made clear, there arise within the prison setting a set of considerations totally absent in the nonprison setting, which require most serious consideration by federal courts in such cases.

There can be no doubt that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," Price v. Johnston, 334 U.S. 266, 285 (1948). While the prison inmate does not in any sense shed his constitutional rights upon passing through the prison gates, there is no question but that the mere fact of his incarceration does subject him to "some curtailment of his freedom to exercise his beliefs." Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967). As the Court of Appeals for this Circuit observed in Sostre v. McGinnis, 334 F.2d 906, 908 (2nd Cir. 1964):

> "[T]he practice of any religion, however orthodox its beliefs and however accepted its practices, is subject to strict supervision and extensive limitations in prison."

See Childs v. Pegelow, 321 F.2d 487, 490 (4th Cir. 1963); Desmond v. Blackwood, 235 F. Supp. 246, 247 (M.D. Pa. 1964); Pierce v. LaVallee, 212 F. Supp. 865, 869 (N D N Y 1962).

The courts have semantically grappled over the years in an attempt to articulate the proper method of analyzing the extent of First Amendment freedoms in the prison setting. As Justice Powell noted, writing for the Court last term in Procunier v. Martinez, supra "the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights has led the federal courts to adopt a variety of widely inconsistent approaches to the problem." 416 U.S., at 406.

It is undoubtedly true that several courts, extrapolating from the constitutional standard developed in the non-prison context in Sherbert v. Verner, supra, have required the demonstration of a "compelling state interest" to sustain prison regulations which have been found to infringe upon the First Amendment guarantees of religious freedom, as appellants would have this Court do in this case. See Ross v. Blackledge, 477 F.2d 616 (4th Cir. 1973); Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); Kahane v. United States, No. 75-C-624 (EDNY May 7, 1975)*, appeal pending. A number of other courts have paid lip service to the "compelling state interest" test but applied a much less rigorous standard. Thus, in Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969), the court articulated the compelling

* Although the court in Kahane applied a compelling state interest test (Opinion at p. 36), the court acknowledged that "courts cite a strong 'compelling' test, but apply it with lesser strength to prisoners' rights to take account of seriously disruptive administrative burdens." Id. at 39-40.

state interest test but found that considerations of security, expense and administrative burden justified the failure to provide Muslim inmates with special meals during Ramadan. In Barnett v. Rodgers, 410 F.2d 995,1000-01 (D.C. Cir. 1969), on which appellants here so heavily rely,* the court speaks both of the practice of religious beliefs within the prison society being "subject to reasonable regulations, necessary for the protection and welfare of the community involved," and of the burden on the government to demonstrate "reasons imperatively justifying the particular retraction of rights."

Many courts, however, have applied a different standard, based upon the general notion that the challenged regulations must be "reasonably" related or "necessary" to the accomplishment of some legitimate state interest related to the operation of its prison system. Cruz v. Beto, 405 U.S. 319, 322 (1972) (complaint alleging "unreasonable exclusion without any lawful justification" of Buddhist inmates held to state a cause of action under First Amendment); Wilson v. Prasse, 463 F.2d 109, 112 (3rd Cir. 1972) ("unreasonable barriers"); United States ex rel. Jones v. Rundle, 453 F.2d 147, 149 (3rd Cir. 1971) ("a prisoner's

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*In Barnett, the court remanded the case for an evidentiary hearing, indicating its desire to have evidence taken on the question of the feasibility "from the standpoint of prison management" and "practical limitations" involved in accommodating the dietary needs of Black Muslims. 410 F.2d, at 1001-2. Upon conducting the hearing in that case, the District Court entered judgement for the respondent, Superintendent of the D.C. jail. H.C. 174-66 and H.C. 66-66 (D.C.D.C. July 14, 1969).

right to practice his religion . . . may be reasonably restricted in order to facilitate the maintenance of proper discipline in prison."); Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967) ("reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion."); X (Bryant) v. Carlson, 363 F. Supp. 928, 930 (E.D. Ill. 1973) ("regulations...which are justifiable and reasonable in the administration of a large population, maintenance of discipline, and control of dangers of hazards presented"). See also Price v. Johnston, 334 U.S. 266, 285 (1948) ("reasonable necessity"); Sostre v. McGinnis, 442 F.2d 178, 200 (2d Cir. 1971); Carothers v. Follette, 314 F. Supp. 1014, 1024 (SDNY 1970) ("must be related both reasonably and necessarily to the advancement of some justifiable purpose"); LeMon v. Zelker, 358 F. Supp. 554, 557 (SDNY 1972).

Still other courts, including this Court on occasion, have adopted even milder standards in scrutinizing prison regulations claimed to interfere with the religious rights of inmates. See Childs v. Pegelow, 321 F.2d 487, 492 (4th Cir. 1963) ("balancing of the plaintiff's religious rights against administrative necessity or convenience"); Sostre v. McGinnis, 334 F.2d 906, 911 (2d Cir. 1964) ("practical limitations...made necessary by the requirements of prison discipline").

What these cases reveal is that the plethora of constitutional standards employed by the different courts which have faced these issues are in no small part mere semantical differences arising from the particular manner in

which courts have chosen to state their standards, rather than indicative of any real difference in the analytical process they have employed. Thus, one must ask, for example, whether any practical differences arise when one court applies a "reasonableness" standard to interests asserted by the government, while another court applies a "compelling state interest" test but gives greater weight to those interests simply because they arise in a prison context.*

In the face of this morass of words and phrases, the Supreme Court undertook last term in Procunier v. Martinez, supra to create order from chaos by attempting "to determine the proper standard for deciding whether a particular [prison] regulation or practice...constitutes an impermissable restraint of First Amendment liberties." 416 U.S., at 412. It is the government's position that this decision and the gloss placed on it later in the term by Justice Stewart in Pell v. Procunier, 417 U.S. 817, 822 (1974) set forth the basic constitutional standard and the method of analysis by which all constitutional challenges to prison regulations by

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* Much of this debate would be of academic interest only but for the fact that the Supreme Court, with one ancient exception in Korematsu v. United States, 323 U.S. 214, 216 (1944), has never held that the "compelling state interest" test was applicable and then found the government, federal or state, to have successfully demonstrated such an interest. Thus, aside from the absence of any guidance from the Court as to what are possible "compelling state interests," adoption by the Court of that standard has come to be synonymous with rejection of any governmental claims asserted, irrespective of whatever force they might otherwise be thought to have. The best treatment of the development of the "compelling state interest" test is found in Justice Harlan's very articulate dissent in Shapiro v. Thompson, 394 U.S. 618, 658-663 (1969).

inmates on First Amendment grounds are to be analyzed.*

The Court began by noting the difference between that case, arising as it did "in the context of prisons" and other First Amendment cases, noting that "Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration." Justice Powell went on to note:

> "[T]his attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody.
> 416 U.S., at 404-405.

Then, while specifically directing its attention to the free speech gaurantees of the First Amendment, the Court enunciated the broad constitutional standard to be applied in First Amendment cases in the prison context:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. ...[T]hey must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. (emphasis supplied)
> 416 U.S., at 413.

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* Noteworthy in this respect is the fact that Justice Powell, writing for the Court, was joined by seven other members of the court in that opinion. Justice Douglas concurred in a separate opinion.

However, it must be noted that the Supreme Court did not ultimately hold that this test was to be applied to all First Amendment challenges to prison regulations and explicitly declined to hold that such a test was to applied to the First Amendment claims of prison inmates themselves. As the Court was careful to point out:

> The District Court stated the issue in general terms as "the applicability of First Amendment rights to prison inmates...," and the arguments of the parties reflect the assumption that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary. In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.... censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.... We therefore turn for guidance, not to cases involving questions of "prisoners' rights," but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.
>
> 416 U.S., at 408-9

In the instant case, absent a showing that the religious rights of non-inmates are infringed upon by the Bureau policy in question, it would appear that a somewhat less strict test than that enundated in Martinez would have to be applied, as the District Court in this case clearly recognized.

While the government will not enter this semantic quagmire by attempting to determine in detail the difference between a "compelling", a "reasonably necessary", or an "important and substantial" state interest, the thrust of the Court's decision is clearly to the effect that a prison regulation or practice being challenged must be scruntinized to determine whether it furthers one or more of "the identifiable governmental interests... [in] the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." 416 U.S., at 412.*

Later in term, the Court again resorted to this general mode of analysis in Pell v. Procunier, supra, at 822, when if instructed that:

> "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

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* These interests, justifying an infringement of First Amendment rights, it should be noted, substantially differ from and are necessarily more compelling within the prison enviroment that are the state interests which the Court in Sherbert v. Verner, supra, indicated might be "compelling" in the non-prison environment, these being limited to "a substantial threat to public safety, peace or order." 374 U.S., at 409. The Court's recognition of this fact in Procunier, thus clearly points up the inapplicability and the unsuitability of the Sherbert formula to the prison setting.

In the instant case, the government demonstrated quite clearly important and substantial state interests served by the regulations or practices of the Bureau of Prisons which these inmates claim infringe upon their First Amendment right to free exercise. The government showed, and the District Court found, that the rule which bars full accommodation of the dietary practices of any religious group or inmate, serves not only the governmental interests in the preservation of internal order and discipline within prisons (Opinion, J.A. 522-524, 536), and the maintenance of institutional security (Opinion, J.A. 525, 536) but also avoids the very substantial financial and administrative problems which departure from that rule would entail (Opinion, J.A. 517-519, 521-522, 523-524, 536), including in particular the need to make similar provision for the needs of other religious groups or inmates (Opinion, J.A. 519, 523, 536). Accordingly, the government was found to have satisfied its constitutional burden, thereby sustaining the challenged policy of not providing kosher food.

Appellants claim, however, that the District Court erred in the standard it applied in both its original and supplemental opinions, in that it required an inmate challenging prison regulations on free exercise grounds to demonstrate that "the practice in question is clearly unreasonable." Instead appellants claim, the two-pronged compelling state interest test enunciated in Sherbert v. Verner is the proper test.

The government has shown, however, that within the prison setting, it is not the standard set down in Sherbert

v. Verner, but that enunciated in Procunier v. Martinez and developed in Pell v. Procunier which must be employed in analyzing prison regulations or practices claimed to infringe upon the First Amendment rights of inmates. When the opinion issued on May 5, the government felt that there was some ambiguity in it as to the constitutional standard actually employed by the court. Accordingly, on May 8, the government made a lengthly oral motion to the District Judge for reconsideration or clarification of that opinion even though the government's position had been sustained. The transcript of that hearing is particularly elvcidating and vital to an understanding of this issue in the case. See J.A. 546-562. First, the court indicated that it had not intended to articulate a constitutional standard at all (J.A. 554-55), but only to describe what it perceived to be "the basic burden of proof which I think is applicable in this case." (J.A. 554, 560-61) The court then gave the government 24 hours within which to file a memorandum in support of its request for reconsideration setting forth its position as to the constitutional standard and the burden of proof. The memorandum was filed on May 9 (J.A. 556-87), and on May 13, a Supplemental Opinion issued (J.A. 588-95).

In that opinion, the District Court presented a careful analysis of the issues, including its consideration of the Pell and Martinez decisions. While the Court still declined to adopt and apply a precise constitutional standard, this fact reflects no more than its well-founded recognition that the Supreme Court itself had not articulated such a test in either Martinez nor Pell. Rather the District Court

read Martinez as a direction by the Court that in deciding questions of First Amendment rights in a prison setting, courts were to consider certain factors otherwise not present, an approach subsequently affirmed by the Courts language in Pell, 417 U.S., at 822.

The District Court declined to apply the rule in Procunier v. Martinez literally noting that in Martinez the Supreme Court held that because correspondence necessarily involved those outside the prison, the mail censorship regulation in question, "works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." 416 U.S., at 408. Accordingly, the District Court reasoned, a somewhat less rigorous test than that set down by the Court in Martinez should be employed where the First Amendment rights affected are those of the prison inmate only, as in this case.

The District Court then carefully analyzed the Court's decision in Pell in which non-discriminatory prison regulations barring press access to specific inmates were upheld. The Court here then found, as in Pell where the availability of certain alternative channels of communication were found to sustain the regulations in question, that the Bureau made a reasonable effort to enable kosher inmates to adhere to their dietary practices while not actually providing

them with kosher food (J.A. 527-528, 593-94).* Finally, the District Court concluded:

> "The Bureau of Prisons has come forward in the present case with an explanation as to the reason the Bureau declines to provide kosher food to Orthodox Jewish inmates. These considerations are described in some detail in my opinion of May 5, 1975. As I stated in the opinion, I am convinced that the Bureau is amply justified for reasons of sound administration, order, discipline and security in refusing to provide special, more expensive food to one group of prisoners on a regular basis." (J.A. 593)

In sum, it is apparent that the District Court's reading of the applicable recent Supreme Court decisions and its analysis of the record in this case in light thereof, was a proper interpretation and application of these con-

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* Appellants attempt to distinguish Pell on precisely this basis at pp. 30-31, ignoring completely the alternative means of adhering to their religious dietary practices made available to them by the Bureau. These alternatives and their constitutional consequences are discussed infra at 66-70.

Appellants attempt to distinguish Pell and Procunier more fundamentally by claiming that somehow the First Amendment's guarantee of freedom of speech "shrinks to insignificance" (Appellants' Brief at 21) when compared to its guarantee of religious freedom. Not only do they cite no authority for this novel proposition but indeed there is none, for the Court has always held First Amendment freedoms to be of the utmost importance, without implying that they are in any sense to be weighed or measured by one another.

stitutional principles.* As will now be demonstrated, the District Court's ultimate decision was amply supported by the record established in this case, and hence requires affirmance by this Court.

B. The Governmental Interests Underlying the Present Bureau of Prisons Policy and the Problems Inherent in Fully Accommodating the Religious Dietary Practices of Prison Inmates

As the government will now demonstrate, the factual record in this case, when considered in light of the applicable constitutional law, amply support the District Court's conclusion that petitioners are not constitutionally entitled to be provided kosher food in prison and that the Bureau of Prisons is not constitutionally required to fully accommodate the religious dietary practices of persons incarcerated in federal penal institutions.

1. Institutional Order and Discipline

In operating or managing a prison facility of any size, matters of internal security, inmate safety and discipline, and the maintenance of order are obviously matters of paramount importance. As the Supreme Court in Procunier v Martinez noted:

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*Noteworthy in this respect is the very candid statement of the District Court in the Kahane case, at p. 40 where, after itself adopting the "compelling state interest" test, the court goes on to note that "courts cite a strong 'compelling' test, but apply it with lesser strength to prisoners' rights to take account of seriously disruptive administrative burdens... This balance is in general accord with the Supreme Court's recent discussion of the appropriate standard for First Amendment rights in the context of prisons in Procunier v. Martinez."

> One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline, the maintence of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners. 416 U.S., at 412

Later in the term, Justice Stewart, writing for the Court in Pell v. Procunier, supra, observed:

> "The 'normal activity' to which a prison is committed -- the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence -- necessarily requires that considerable attention be devoted to the maintenance of security." 417 U.S., at 426-27

Historically, matters concerning the supervision of inmates and the maintenance of internal security have been viewed by the courts as matters lying within the particular expertise of prison officials, requiring that considerable deference be given their judgment. Procunier v. Martinez, supra, at 404-5. Accord Sostre v. McGinnis, supra, at 908, 911-12; Childs v. Pegelow, supra, at 489.

One of the principal reasons the Bureau of Prisons has decided not to provide kosher food to prison inmates stems directly from its well-founded fear that providing any inmate with such specialized treatment would create resentment and jealousy among other prison inmates. In the complex and emotionally-charged environment of the prison, it is of paramount importance that inmates feel they are being treated fairly and equally. Any differential treatment may cause resentment toward both the officials responsible for

such treatment and the inmates who are its beneficiaries. This concern, attested to by a number of witnesses directly involved in the day to day activities and operations of the federal prisons, was first expressed by James Wahl when asked by the court to describe the problems in providing kosher food in prison:

> "I think the biggest problem [with making kosher food available] would be to give any one or two or a group of inmates specialized treatment. I think this would cause a great deal of unrest throughout the institution. I think it would be difficult for that special group to even live in the institution with the other inmates, knowing that they were the recipients of a special diet or a special favor or special consideration." (J.A. 182)

This same concern was forcefully expressed by Warden Louis Gengler (J.A. 383-4, 398-99, 431-33) and noted by Chaplain Forsythe from Danbury. (J.A. 468-470) Accordingly, the Bureau has attempted, as nearly as possible, to treat inmates equally in all matters. In the case of religious practices, the Bureau has attempted to accommodate the inmates' desires concerning weekly religious services, the availability of clergymen for counseling, and the yearly celebration of certain religious holidays such as Christmas and Passover. (J.A. 155-56, 385-98, 417-19, 445-75) Provision was also made for the serving of traditional religious meals on certain of those yearly holidays. (J.A. 371-73)

The accommodation of an inmate's religious dietary practices on a daily basis, however, was thought to present new and substantial problems related to prison discipline and order, independent of any administrative or financial

considerations involved. These concerns stem from the fundamental nature of these interests, namely both the inmates' religious beliefs and his food. Both of these human needs are perceived by inmates as not merely valuable and desirable but as being fundamental to their existence while in prison. (J.A. 167, 384, 431). Accordingly, as Warden Gengler testified, inmates tend to be extremely sensitive to even slight perceived variations or tendencies in the prison menu (J.A. 384, 431-32), making the accommodation of the dietary practices of any particular inmate or religious groups a potential source of a multiplicity of problems relating to institutional order.

In March of 1974, Warden Gengler decided to provide kosher frozen dinners to an inmate on an experimental basis, after consultation with Norman Carlson, the Director of the Bureau of Prisons. (J.A. 377). When the experiment proved to present no serious problem other than the cost, (J.A. 382) it was decided to provide a second Jewish inmate, one Aaron Ron, with the remainder of these dinners. The events which followed were then described by Warden Gengler as follows:

> "Rabbi Ron was furnished with the kosher dinners at a time when we had about six militant black Muslims in our population. They immediately saw the fact that he was getting this food and in fact on one occasion six of them surrounded my food administrator in the corridor in a very hostile manner and approached him and demanded to know why they couldn't have their food in much the same fashion that Rabbi Ron had his. Cooler heads prevailed on the part of an experienced food administrator, and the matter stopped there before anything serious got going in the corridor." (J.A. 381)

The matter did not end there, however, for as Warden Gengler testified, Aaron Ron was attacked shortly thereafter by the Black Muslims in the prison dining area and injured, requiring hospitalization. (J.A. 381). He was then placed in protective custody and transferred to another institution because, as the Warden stated,"his life was in jeopardy." (J.A. 381)

Appellants attempt to attribute this incident to Ron's personality (Brief at 33).* Prisons officials and courts can take little comfort in this claim, even if it were true, since prisons are by definition populated by individuals who have demonstrated themselves to be unable to function in a socially acceptable manner. This incident demonstrates the legitimacy of the concern of prison officials that the provision of kosher food will pose a problem to the maintenance of order and discipline within the institution. As the District Court noted, the incident "illustrates the

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* The testimony claimed to support this theory is that of another Jewish inmate who was incarcerated with Ron only at Danbury and simply does not support it:

> "Q. Did [Rabbi Ron's activities in Danbury] cause resentment among other inmates?
>
> A. Only among Jewish inmates.
>
> Q. Did they cause resentment among black and Muslim inmates too?
>
> A. Not in Danbury, sir." (J.A. 498)

point that in a volatile prison atmosphere differences in treatment are inevitably potential sources of danger." (J.A. 522)*

The Warden went on to describe another incident at Lewisburg Penitentiary in 1971 when Black Muslim inmates, angered over what they felt to be unfair treatment of their religious practices, occupied the institution and assaulted two officers. (J.A. 383-84)**

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* The suggestion that the solution to such problems lies in punishing those who commit these violent acts (Brief at 45) is somewhat short-sighted. While such flagrant and serious offenses should never be allowed to go unpunished, an approach to these problems based upon the use of punishment alone fails to take note of the fact that underlying these incidents are often legitimate grievances, whether real or perceived. Where the dietary practices of only a few religions are provided for by prison officials, such grievances, despite their unlawful manifestations, require thoughtful consideration by prison officials and not merely rigid punitive measures.

The complex legal considerations which may prompt the courts to find that the dietary practices of one religion pose too great a burden on the Bureau while those of another must be accommodated, will not be appreciated by the unsophisticated federal inmate population. While their understanding of these constitutional distinctions is of course not the standard by which the Bureau should guide its actions, these difficulties point up the legitimate concerns of prison officials and the intractability of these problems.

** Warden Gengler also described a similar incident unrelated to religion involving Mexican-American inmates at a federal prison in Oklahoma. (J.A. 384) A related concern with respect to the provision of kosher food is that in prison facilities it is not uncommon for groups to form along ethnic or racial lines, with considerable tension and even violence resulting. Unfortunate though it may be, the recognition of ethnic or religious differences by the Bureau may tend to strengthen these lines, heightening the tensions, or may simply provide a pretext for retaliatory action.

The Warden further testified that:

> "[I]t is very easy for prisoners to seize upon these little differences, whether it be in the regular fare of food . . . These are very miniscule items to many, but in an institution which is already by its nature explosive it takes on a more important aura." (J.A. 384)

In conclusion, he stated that on the basis of these experiences and the related problems described herein, that it would be "impractical" to provide kosher food on a regular basis. (J.A. 383)

On the basis of this record it is apparent that the concerns of the prison officials about institutional order and discipline, were kosher food required to be provided, are both legitimate and well-founded, and their response can hardly be termed exaggerated. Nonetheless, appellants counter that: (1) the Bureau's fears about prison discipline are in fact exaggerated because only in the case of Aaron Ron did violence result. (Brief at 43) The fact that such an incident occurred in one of only three instances in which kosher food was provided requires no further comment for it demonstrates not only the potentiality, but the reality of such problems, thereby underscoring the seriousness and the legitimacy of the concerns of prison officials. Furthermore, as the Supreme Court observed in Procunier v. Martinez, while unnecessarily broad responses to these problems by prison officials are illegitimate:

> "This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter.

> Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty." 416 U.S., at 414

(2) The accommodation by the Bureau of diverse religious practices including religious literature, services, and holidays are claimed not to have resulted in resentment or disciplinary problems. (Brief at 42-3) This assertion engenders two responses. First, aside from the fact that food is more fundamental to an inmate than these services (J.A. 167, 384, 431), the opportunity to partake at their programs and services is extended to all inmates thus removing any reason for resentment. See supra at 12. The Bureau has never claimed Muslim inmates felt resentment because they could not get kosher food or attend Seder but only because they were not provided food in conformity with their own religious practices. As long as all inmates are afforded the opportunity to read their own religious literature, to attend their own services and to celebrate their own religious holidays, there can be no cause for resentment.*

Second, the District Court was careful to note that the Bureau "draws a sharp distinction between occasionally allowing a special meal and the regular provision of special

*Presumably atheists would not resent the provision of religious services to others since their beliefs do not require that others be forbidden from worshipping God, but only alleviate the need to do so on the part of the adherent. Thus, the availability of these other religious services should be a matter of total indifference to the atheist inmate.

food to one or more religious groups." (J.A. 524) The record in the case makes clear this distinction and the fact that inmates reacted only to apparent patterns of, or regularized special treatment, and not to such things as religious meals observed once each year. (J.A. 400-1, 431-32).

Identical concerns with the maintenance of institutional order and discipline and the reality of inmate resentment arising from disparate treatment of inmates were discussed extensively by the Supreme Court last term in its consideration of the constitutional permissibility of restricting press interviews with particular inmates in Saxbe v. Washington Post Co., 417 U.S. 843 (1974) and Pell v. Procunier, supra. There, the court noted that under prior prison policy, press attention tended to become "concentrated on a relatively small number of inmates who, as a result, became virtual 'public figures' within the prison society and gained a disproprotionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems". 417 U.S., at 431-32.

There the lower courts had directed that a selective policy be pursued to cope with this problem, whereby officials would make case-by-case determinations. The Supreme Court rejected this approach, upholding the Bureau's outright ban, noting that:

> "In the expert judgment of petitioners . . such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and re-

> sentment among inmates who were refused interview privileges granted their fellows." 417 U.S., at 849.

Among the reasons the Supreme Court noted in upholding the Bureau's absolute ban on selective press interviews was the testimony of the Director of the Bureau of Prisons in Saxbe v. Washington Post, supra, that:

> "[O]ne of the very basic tenets of sound correctional administration' is 'to treat all inmates incarcerated in (the) institutions, as far as possible, equally.'" 417 U.S., at 849.

In conclusion, there are inherent in any attempt to accommodate the dietary practices of a particular group of inmates, serious and complex problems of institutional dynamics and prison management which are felt by prison officials, based on substantial experience, to preclude such efforts. As the Supreme Court in Pell v. Procunier, supra, directed:

> "Such consideratons are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." 417 U.S., at 827

The record in this case demonstrates convincingly, as the District Court explicitly found, that the response of the Bureau in declining to provide kosher food in the face of these considerations is not "exaggerated" and should be sustained.

2. Problems of Accommodation Arising From The Multiplicity of Religious Groups Represented in the Prison System

Were the Bureau of Prisons required to fully accommodate the dietary practices of Jewish inmates by providing them with kosher food, it might then become necessary to accommodate the dietary practices of numerous other religions represented in the federal prison system. Such an imperative would be both constitutional and practical in origin, and the problems which would result are very substantial.

The source of the constitutional imperative would be the Establishment Clause of the First Amendment. There can be little question but that a Bureau policy of accommodating the religious dietary practices of one religion and not those of another would run afoul of the Establishment Clause, mandating as it does, a policy of rigid governmental neutrality in religious matters. McCollum v. Board of Education, 333 U.S. 203 (1948); Everson v. Board of Education, 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."); Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice . . . it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and religion and non-religion.").

Accordingly, were the prison ordered to make kosher food available to Jewish inmates, it might well be constitutionally compelled to accommodate the dietary practices of many other religious groups within the federal prison system. Cruz v. Beto, 405 U.S. 319, 322, n.2 (1972).

The practical considerations compelling the Bureau to accommodate these diverse practices in a sense derive from, and are closely related to, the previously-mentioned problems of internal order and discipline. This stems from the fact that aside from any legal obligation to accommodate the dietary practices of other religions, the granting of such consideration to one religious group would bring demands for similar considerations by many if not all others, as seen in the previously-described incident where Muslim inmates surrounded the food administrator demanding that their dietary needs be met as well. (J.A. 381) Warden Gengler thus testified that if kosher food did have to be provided, "The precedent established would undoubtedly lead other groups to ask for similar programs," (J.A. 399) and those demands would in all likelihood have to be satisfied lest problems and claims of differential or discriminatory treatment arise. (J.A. 383, 399, 401, 431-32, 468-70) *

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* This concern is not a new one for as Rabbi Hait testified in explaining the problems encountered a year and a half ago in attempting to provide kosher meals to the prison:

> Warden Gengler, and another official, Mr. Kinney, indicated to me that there are other groups that also would insist upon preferential treatment if they learned that special food in keeping with the requirements of inmates would be served to them; they would insist upon similar consideration." (J.A. 316)

It should also be noted that to the extent the burdens imposed by some religious practices are found by the Bureau, and ultimately the courts, to be outweighed by the various governmental interests involved, thus excusing the prison from providing for them, the effect may well be to create or exacerbate the problems of internal order and discipline by sanctioning the clearly disparate treatment of prison inmates. Even among those being catered to, there would be the potential for inmate friction insofar as some groups felt themselves to be receiving poorer fare than others, or insofar as non-religious inmates felt others were receiving preferential treatment.

Were the Bureau required to accommodate the dietary practices of the different religious groups within the prison system, the problems of added expense and the coordination and personnel needed to provide for and serve the practices of these different groups would be both obvious and staggering. As the discussion infra at 49-54 indicates, the additional costs and administrative burdens in providing kosher food alone would be substantial, and would be multiplied many-fold by requirements that the dietary practices of other groups be accommodated.

Aside from the sheer diversity of diets which would have to be catered to, some of the more obscure religious practices pose a whole host of problems, both in and of themselves, and in relation to other religious groups. Noteworthy in this respect are the dietary laws of the

Church of the New Song, a religious group in the federal penitentiary in Atlanta which at one time had to be afforded a government-paid chaplain and the use of prison facilities for the conduct of its religious services, like all other religious groups.* Under the tenets of that religion, the inmates are required to regularly eat porterhouse steak and to consume Harvey's Bristol Cream Sherry. See Theriault v. Silber, 72 CA 212, at 5 (W.D. Tex. 1975); Theriault v. Carlson, 339 F. Supp. 375 (M.D. Ga.), vacated, 495 F.2d 390 (5th Cir. 1974). (J.A. 399)

The preposterousness of these various practices** should not detract from the seriousness of the problems which they portend. There lurk very serious practical as well as constitutional problems in appellants' suggestion that the more obscure religions and the more obscure religious practices of established religions can be dealt with by making "a searching test of [their] bona fides," since appellants contend that "In the absence of evidence going

*While this case involves the government's constitutional obligation to accommodate only religious dietary practices, the Court's decision in this case will undoubtedly be weighed heavily in determining the extent to which the United States will be required to accommodate many other religious practices of federal inmates. Indeed the District Court in this case conducted extensive inquiry into related religious practices throughout the proceedings. See J.A. 445-75.

**Even greater problems might be posed by religious groups which claim they must ingest or use certain drugs in compliance with the dictates of their religion. See People v. Woody, 61 Cal. 2d 716 (1964) (religious use of peyote not subject to criminal prosecution); Leary v. United States, 383 F.2d 851 (5th Cir.), rev'd on other grounds, 392 U.S. 903 (1967) (religious use of marijuana).

to bona fides, however, it is appropriate to accept the religious principles as stated." (Brief at 38, n. 6)*

More fundamentally, however, the course of action which appellants suggest will require the Bureau initially, though ultimately the courts, to make extremely subtle and sensitive decisions as to which are "true" religions, "true" religious practices, and who is a "true" believer. This task is one which the Bureau of Prisons is perhaps ill-equipped to make, and the prospect of its being called upon to do so in the prison setting is not a suggestion which should be looked on with favor in a society which prizes religious freedom as much as does ours.

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* This suggestion is of dubious constitutionality at best, and opens a virtual pandora's box. Under Welsh v. United States, 398 U.S. 333 (1970), it is at best a dangerous course of action for the government to decide which are bona fide religions, and it is clearly under an obligation to adopt a very broad definition. In concurrence, Justice Harlan questions whether it is even constitutionally permissible to condition any governmental service or benefit on an individuals' religion or non-religion. This raises the possibility that if the Bureau were required to provide for the religious needs of inmates, it might be constitutionally required to provide for such practices where they stemmed from an inmates' beliefs which occupied a similar place in his life as would religion. The incredible burden this alone would impose upon the Bureau, then compounded by appellants' claim that "any bona fide religious practice of prison inmates is protected by the First Amendment against governmental inhibition." (Brief at 21)

In view of these serious constitutional and practical difficulties which would result were the government required to accommodate the dietary requirements of prison inmates by providing kosher food, the Bureau of Prisons has chosen to follow a policy of limited accommodation in which the religious needs of the inmate population, as all other things, are treated as uniformly as possible, and as liberally as institutional considerations will allow. This has resulted in its not fully accommodating the religions dietary practices of the inmates, whether they be Black Muslim or Jewish. It was perhaps with many of these same considerations in mind that the framers of the Constitution originally drafted the Establishment Clause, see discussion in Everson v. Board of Education, supra, 33-44 (Rutledge, J. dissenting), and it is respectfully suggested that similar reasoning must lead the court to the same conclusion, namely that a policy of firm governmental religious neutrality is the wisest course of action.

3. Financial Considerations

An obvious burden which the provision of kosher food would place on the federal prison system is that of the increased financial cost of purchasing such food, independent of any of the other costs generated in acquiring, transporting, or preparing this food.

As the Administrator of Food Services explained, each year Congress allocates the Bureau a fixed amount of money to provide for the food, medical, and clothing needs of the federal prison population. (J.A. 160-63) The Bureau then plans the menus at the different prison facilities in the manner described by the Administrator (J.A. 150-54) taking into account budgetary limitations, among other

factors. (J.A. 163) While the cost of feeding the inmates varies from institution to institution based upon the market conditions from which each facility purchases its food (J.A. 163-66), it is the Bureau's policy to assure that equal food is provided at the different institutions. (J.A. 165) Thus, the average cost of providing an inmate three meals per day throughout the prison system as a whole is $1.38 during fiscal 1975 (J.A. 165) while the average cost at the Youth Center in Ashland, where petitioners are presently located, is a somewhat higher $1.85 (J.A. 164) since Ashland, unlike many other fedeal prisons, has no farming facility to produce its own food supplies. (J.A. 161) At West Street in New York, it is $1.75 (J.A. 380).

The Administrator further testified that frozen kosher dinners consisting of an entree and two vegetables which are available in limited quantities in Huntington, West Virginia, some 45 miles from Ashland (J.A. 178) cost between $2.50 and $3.00 per meal (J.A. 180).* The caterer who actually sold kosher dinners to West Street when the prison experimented with providing them to one inmate (J.A. 377), testified that the cost of those frozen kosher dinners was between $4.50 and $5.00 (J.A. 328-29) On the other hand, Mr. Wahl testified that at Ashland, the average cost of an entree and two vegetables from the regular prison fare

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* It was also testified that fresh kosher food, available only in cities at least 100 miles from Ashland, and thus presenting other administrative considerations and costs, were between 25-100% more expensive than comparable non-kosher foods. (J.A. 174)

was $.30 (J.A. 181)* This means that it would cost between ten and fifteen times as much money to provide an inmate with one kosher meal, depending upon location, as it would to provide him with regular prison fare.**

Appellants attempt to downplay these facts by pointing out that there are probably only a small number of Jewish inmates in federal prisons, and even fewer who would require kosher food.*** While the Bureau does not dispute

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*The low cost of food is principally the product of the Bureau's bulk purchasing processes (J.A. 436) and the fact that many federal institutions have farms and produce their own food. (J.A. 161, 424) James Wahl described the careful nutritional analysis program followed by the Bureau in planning prison menus which was developed for the Bureau by the National Academy of Sciences. (J.A. 153-54, 167) Wahl further testified that the diet provided the inmates was always "far in excess" of the nutritional standards adopted by the Department of Agriculture. (J.A. 154, 167) Warden Gengler described some of the food purchasing policies at his particular institution with respect to fat content requirements for meat, (J.A. 435) and described the high quality of the food provided. (J.A. 434-36)

** The Administrator noted that the kosher meals would have to be supplemented with other items normally included in a prison meal, including soup, salad, bread and butter, desert, and a beverage. (J.A. 77, 180)

***The Bureau attempted to determine the actual number of Jewish inmates in federal prison who followed the kosher practices but no such statistic has been kept. At one point, petitioners' counsel estimated the number involved as being perhaps less than six. (J.A. 210) Despite counsel's indication that this number was purely a guess, the court in Kahane picked up this figure and relied on it when counsel in that case introduced into evidence the transcript of the April 16 hearing in this case. It should be noted that the hearing in Kahane was held on April 25 so that the court there did not have before it the transcript of Warden Gengler's testimony nor the bulk of the remaining testimony in this case, taken on April 29 and 30. The Government called no witnesses in that case and engaged in no cross-examination.

that the numbers involved are not great, it would note three additional considerations: (1) the Bureau works under very strict monetary restraints imposed by Congress and thus when more money is spent on one group of inmates, it means there will be less money available to provide for the needs of others. (J.A. 176, 188-89) The cost of one kosher meal as noted is enough to provide similar regular food to at least ten inmates. (2) While there may now be only a few inmates who presently wish to eat kosher food, it is not inconceivable that if the Bureau were required to provide it, many other inmates might want to eat kosher food, as Huss does now, some legitimately and others perhaps not. (3) It must be remembered that the prison may well have to make similar provisions for the special dietary practices of other religions, such as the Muslims, thereby greatly increasing the Bureau's expenses.

Finally, it must be noted that the government has never contended that the financial burden of providing kosher food was the principal reason, or even that it was a sufficient reason, standing alone, for rejecting petitioners' First Amendment claims.* Rather it has always maintained that this was an important factor to be considered by the court in its decision together with other more compelling reasons the Bureau feels it cannot accommodate the religious dietary practices of petitioners.

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* James Wahl stated on two different occasions during his testimony that the added cost factor was not the Bureau's principal problem with providing kosher food (J.A. 182, 189) and proceeded to explain what he perceived the more substantial problems to be. (J.A. 170-71, 180, 182, 186-89, 197-99)

In light of the substantial increase in food expenditures which the provision of kosher food would necessitate, it must be noted that courts have in fact given weight to this consideration, most notably in the Black Muslim dietary cases. In Walker v. Blackwell, supra, at 25, for example, the court observed that:

> "[T]he prison officials did not feel that they could afford, within the limits of the existing budget, to buy the various items, not already in stock at the penitentiary, which were required by the restricted diet of the Muslims."

The court in that case rejected the inmates' religious dietary claims despite its application of the "compelling state interest" test by holding that:

> "It is our opinion that considerations of security and administrative expense outweigh whatever constitutional deprivation petitioners may claim. . . [T]he added expense of purchasing and preparing this special food . . . is another substantial reason for placing these minor restrictions on the practice of the faith of Islam of the penitentiary." (emphasis supplied)
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> 411 F.2d at 26

See also Barnett v. Rodgers, supra, at 1002 (where the court in remanding the case for an evidentiary hearing indicated its concern with the "budgetary constraints" upon the Bureau.)

Accordingly, the District Court in this case, after making findings as outlined above, (J.A. 517-18, 521-23) also weighed the cost factor in its decision that petitioners were not constitutionally entitled to be provided kosher

food while in prison, concluding that "the Bureau of Prisons is entirely correct in refusing to purchase special food for one group of prisoners, which is distinctive in quality and far more expensive th n the food issued to prisoners in general." (J.A. 536) The court also rejected petitioners' suggestion that they be permitted to pay the additional costs of such food. This issue is discussed along with other alternatives infra at 64-66.

4. Institutional Security

James Wahl and Warden Gengler both explained in some detail that all supplies coming into federal prisons are required to go through a rather elaborate security check in which both the vehicle transporting the supplies and the supplies are subjected to a thorough inspection, or "shakedown," while passing through a canal-like series of interlocking gates. (J.A. 186-87, 377-78) Obviously, the receipt of kosher food shipments would require additional inspections, (J.A. 401) entailing the expenditure of more prison staff time as well as mathematically increasing the opportunities for the importation of contraband into the institution.

Appellants attempt to downplay the impact of importing kosher food on the problem of institutional security by arguing that "the security problem is no more severe than in any other instance when food is brought in from outside," (Brief at 45) the implication being that the

security problem in either case is somehow not particularly serious. Courts have, however, been particularly sensitive to this problem as seen in Walker v. Blackwell, supra, where the court, applying a "compelling state interest" test, noted the additional security personnel needed to supervise late night meals required by the Muslim religion, holding:

> "It is our opinion that considerations of security and administrative expense outweigh whatever constitutional deprivation petitioners may claim.
> 411 F.2d, at 26.

See also Carothers v. Follette, 314 F. Supp. 1014, 1024 (SDNY 1970); Long v. Parker, supra, at 820.

Aside from the seriousness with which the courts have treated the problems of institutional security generally, kosher food presents an even more serious problem in that, as Mr. Wahl testified, when small amounts of any item being brought into the prison are known to be intended for use or consumption by a small, readily-identifiable group or a particular inmate, the possibilities for the passage or smuggling of contraband such as weapons or drugs are greatly increased,* thereby necessitating even more rigorous inspection. (J.A. 182, 184, 377-78) This problem, too, cannot be downplayed by claims that such eventualities are unlikely in the case of any particular petitioner seeking kosher food, for it must be recognized that the Court is being called upon to promulgate

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* This is particularly so since such foods are sealed outside the prison and not opened until actually cooked. This could present serious questions where kosher inmates have been assigned to the kitchen staff, as the testimony of a former Jewish inmate makes clear. (J.A. 334)

a general rule as to the requirement of providing kosher food.*

Thus, the substantial governmental interest in institutional security, explicitly recognized by the Supreme Court in Procunier v. Martinez, supra, at 412, as a legitimate basis upon which to regulate First Amendment rights in the prison setting, is a factor which must also be seriously considered in assessing petitioners' claims, as was done by the District Court in its decision. (J.A. 525, 536)

5. Other Administrative Problems

In addition to the factors already considered, it is apparent that the provision of kosher food will necessarily result in certain additional problems including those of acquiring, transporting, storing, preparing and serving such food. These problems will in turn generate certain additional expenses and personnel needs.

a. Acquisitions - As James Wahl testified, the Bureau of Prisons is required by Congress to pruchase its food requirements through a highly-regimented bidding process whereby the food administrator at each facility solicits bids for food lot purchases and contracts are awarded to the lowest bidder. (J.A. 159, 180, 205-6) The requirement that food be procured by this process is contained in 41 U.S.C. §5, and the regulatory scheme set out both in the Federal Procurement Regulations, 41 C.F.R. Ch. 1 and in Bureau

*Appellants' approach thus not only erroneously discounts the greater security problems raised by kosher food but also fails to consider recent incidents in which weapons have been smuggled to inmates, with fatal consequences for both inmates and prison guards on at least two of those occasions.

Policy Statements 12500-12910. This complex regulatory scheme is fully explained in the Government's Memorandum in Opposition, at J.A. 48-51 and does not require repetition here. The point is that in order to acquire kosher food, the prison cannot simply make spot purchases but must meet detailed food specification requirements, (J.A. 168); see 41 C.F.R. §1-3.210(b), solicit bids, and award the contract. (J.A. 180, 205-6)

b. Transportation - If the Bureau were required to provide kosher food to inmates in remote areas such as Ashland, it would be necessary both to pay for and arrange for the transportation of the food. As James Wahl testified, fresh kosher food is available only in Louisville, Kentucky, Columbus, Ohio, or Chicago, all of which are over 100 miles from Ashland, (J.A. 169) while frozen kosher food is available only in Huntington, West Virginia, 45 miles from Ashland. (J.A. 178) Accordingly, the transportation costs of providing kosher food would be substantial, requiring modification of the previous financial analysis. (J.A. 170, 181)

c. Storage, Preparation, and Service - While many of these problems would be eliminated by the use of frozen kosher meals, some care in cooking the dinners with non-kosher food might be required, as Rabbi Ralbag indicated, (J.A. 116-17, 255-56) and would in any event require the use of separate eating utensils. (J.A. 117, 170-71, 180) The problems in providing fresh kosher food were well summarized in a letter from the Director of the Bureau of Prisons:

> This would require separate preparation and serving facilities, equipment, utensils, dinnerware, menus, subsistence and sources of supply and specially trained staff. The cost of such an operation would be prohibitive, since in effect we would have to establish two totally separate, independent food operations in every institution where a requirement for kosher food was found." Petitioner's Exhibit 4

See also J. A. 116-17, 170-71, 187.

d. General Administrative Burdens - While no one of these administrative problems alone imposes a burden of such magnitude as to constitutionally excuse the Bureau from accommodating the religious practices of its inmate population, the sum total of them does become a significant factor which courts have looked to in such cases. Walker v. Blackwell, supra at 26; Childs v. Pegelow, supra, at 492; Barnett v. Rogers, supra, at 1001-3. The cumulative burden these considerations impose on the prison system require both direct monetary outlays from scarce funds and may also entail the expenditure of much staff time, perhaps even necessitating the hiring of additional personnel. (J.A. 188, 401) To the extent the Bureau is required to do this for one group of inmates, it will subtract from the availability of these resources to other prisoners. (J.A. 188) To the extent it is required to do so for many or all religious groups, the increased costs and problems of coordinating the kitchen facilities and staff become monumental.

6. Conclusion

It has been the position of those claiming the government has a constitutional obligation to provide kosher food to Jewish inmates, that the principal problems involved in so doing are only administrative or financial in nature. As appellants assert, "what is involved here is conduct which poses no threat whatever to society; it merely results in administrative inconvenience or added expense." (Brief at 27) This same analytic approach is found in the decision in Kahane v. United States, supra, on which appellants so heavily rely, where the court termed the obstacles to providing kosher food "minor practical problems," and ordered the Bureau to provide the petitioner there with kosher food.*

* Contrary to appellants' suggestion that the provision of kosher food to Kahane indicates the ease with which this can be done, it should be noted that the burdens involved in the Court order were felt by the Bureau to be so substantial as to preclude, pending appeal, sending the defendant to Allenwood where he was to have served his sentence. Rather, the Bureau has been compelled to continue to house him in a halfway house in New York and to release him to go to kosher restaurants, an infringement on its authority which it feels to be untenable.

Aside from any error in the constitutional standard adopted by the court in Kahane, conceded by the court to be at variance with the analysis suggested in Martinez, see supra note at 34 n., and the jurisdictional defects which the government feels adhere in the court's decision in that case, the fundamental flaw in the analysis presented there is the failure of the court to consider the principal reasons for not providing kosher food, and focusing instead on the narrow administrative considerations which neither the Bureau nor the government has ever contended were themselves constitutionally sufficient, see supra at 52,58. To some extent, however, that case must be viewed as limited to the facts leading to the court's finding that the government had made no showing of those interests in that case. In Kahane, the government, contending the court lacked jurisdiction to prescribe, at the time of sentencing, the conditions upon which an inmate was to be confined, presented no witnesses and did not cross-examine anyone. Also, the transcripts of the April 28 and 30 proceedings in this court were not, like those of April 1 and 16, introduced in the proceedings in the Eastern District. The government filed a notice of appeal on June 6, 1975.

Throughout this case, too, appellants have tended to view the governmental interests underlying its refusal to provide kosher food to prison inmates in similarly mundane terms. Thus, it is asserted, "the issue, starkly framed is whether the Bureau of Prisons may, on account of administrative difficulties described as 'minor practical problems' by Judge Weinstein and as 'picayune' by Judge Gurfein* force a federal prisoner to choose between substantial malnutrition and surrender of his conscientious scruples." (Brief at 20-21) This position is further evidenced by appellants' repeated efforts to elicit testimony from persons with no background or experience in prison administration that the provision of kosher food would pose no serious problem for the Bureau. (J.A. 123, 207, 291-2, 318-9, 329, 335) To that end, the transcript is replete with references to the ready availability of kosher food in hotels, air-planes, and the like.

The principal flaw in this approach is its failure to perceive the very fundamental differences between the prison and the non-prison setting and the existence of a set of problems and concerns in the former which simply do not

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* The comments of Judge Gurfein, in dissenting from the denial of an interim order providing appellants with kosher food pending appeal on May 2 , were explicitly limited by the Judge to the application then before him. Presumably many of the governmental interests raised herein would be either less substantial (costs) or absent (multiplicity problems) where the court was asked to grant such relief only to appellant himself on an interim basis. Hence, those comments should not be taken as a statement of Judge Gurfein's views on the merits of the governmental interests asserted herein or on this case itself absent his having had an opportunity to study the full record in this matter.

arise in the latter.* This is the reality underlying the principles enunciated by the Supreme Court in Pell and Martinez, and is the reason the Court refused simply to import the analysis of Sherbert v. Verner into the prison setting. As the foregoing demonstration makes clear, these are matters of serious consequence to the day to day operations of the federal prison system and simply cannot be so lightly dismissed. As the Court noted Procunier v. Martinez, supra, at 412:

> "One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners."

These interests must be given substantial weight in this Court's consideration of the claims raised herein.

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* Indeed, the mere comparison itself of the problems of the providing food in hotels or on airplanes as opposed to prison, demonstrates the fundamentality of the error in such an analysis. Travelers and guests are by definition in such places of their own volition. If dissatisfied with any of the provisions made for them, they remain free to simply leave or to use other facilities. A prisoner, on the other hand, has no choice as to the means or place of his confinement. He is, as Warden Gengler noted, simply not free to leave (J.A. 433) and thus must express his dissatisfactions both with the fact of confinement itself and any other grievences in other ways. This complex interaction of human emotions and contact day after day simply does not occur anywhere else in society and thus there inhere in it problems and considerations which do not obtain in the society at large. The lesson of Pell and Martinez is simply that courts should recognize these problems and the legitimate concern with them on the part of prison officials, and must give them serious consideration in their deliberations.

C. Alternative Means of Accommodating Appellants' Religious Dietary Practices

Pursuant to the constitutional requirement that where governmental regulations infringe upon fundamental rights, "the limitation of First Amendment Freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved," Procunier v. Martinez, supra, at 413, the court and the parties explored various possible alternatives to the Bureau's policy of not providing kosher food, which would still achieve the legitimate state interests at stake while allowing appellants to fully exercise their religious dietary practices. Two principle alternatives were considered. As will be seen both were found to meet only a few of the problems discussed previously, and in any event were fraught with practical and legal difficulties of their own. Thus, the Court found them not to be viable alternatives to the present system of effecting the governmental interests at stake. It was shown, however, that a third alternative does exist, which the government contends is constitutionally sufficient to cure the slight interference with appellants' rights which the present policy may impose.

1. Incarceration of Petitioners at the West Street Federal Detention Center in New York.

Tacitly acknowledging the substantial problems involved in making kosher food available to the inmates at the Federal Youth Center in Ashland, Kentucky, petitioners suggested that "such relief can most readily be granted if the defendants are assigned to the Federal Detention Center

in New York City to serve their sentences." (J.A. 7) This possibility, however, was found to be both penologically undesirable and legally impossible.

Mrs. Shirley Stutely of the inmate classification division of the Bureau in Washington was called by the government and explained the process by which inmates are designated to serve their sentences at particular federal correctional facilities. (J.A. 341-362) The factors which the Bureau considers are principally the inmate's age, his prior criminal record, the length of sentence, the seriousness of his offense, and his location. (J.A. 342-43) As Warden Gengler explained, West Street is not an institution to which inmates are normally sent to serve their sentences but is rather only a detention center, holding persons on or awaiting trial or on writ. (J.A. 367-68) The Warden went on to describe the crowded facilities there, housing both the first offender and the hardened criminal together on at least a temporary basis. (J.A. 368-9) In view of the highly transient prison population, virtually no training or rehabilitative programs exist at West Street. (J.A. 369-70)

Mrs. Stutely explained, however, that Ashland was a youth center, designed specifically to meet the correctional needs of young offenders with little or no prior records. (J.A. 344) Extensive rehabilitative treatment is available there including a college degree program, the Newgate Project, in cooperation with a local community college. (J.A. 345-46) Accordingly, the Bureau felt that from a penological

perspective, it was highly desirable that petitioners not be incarcerated in New York but in Ashland.

The government, concerned that these penological concerns not be frustrated, pointed out to the court and petitioners that under 18 U.S.C. §4082, upon sentencing, an offender was committed to the custody of the Attorney General, and that absent an abuse of his discretion in designating where an inmate was to serve his sentence, the court could not direct him to place inmates in particular institutions. Rodriguez v. United States, 409 F.2d 579 (1st Cir. 1969); Hamilton v. Salter, 361 F.2d 579, 581 (4th Cir.1966); United States v. McIntyre, 271 F.Supp. 991 (SDNY 1967). The District Court, while noting the characteristics of the two penal institutions (J.A. 521) and the legal impropriety of directing that an inmate be designated to a particular institution (J.A. 537), ultimately found it unnecessary to decide this issue since it found petitioners were not constitutionally entitled to be provided kosher food in any event. (J.A. 537)

2. The Donation to or Purchase by Inmates of Kosher Food

It was first suggested by counsel during the hearing on April 16 (J.A. 94) that appellants be permitted to purchase or pay for their own kosher food. Warden Gengler (J.A. 399-401) and James Wahl (J.A. 182) indicated that this would violate certain regulations which limit that which inmates can privately import into the institution

(Policy Statement 7300.4A (April 24, 1972)) or which charities may donate, as well as regulations governing the offering by the Bureau of foods other than through the food service. (J.A. 425-26)

The objections of the government to this proposal, however, were never simply that it would violate the prison regulations but much more fundamentally that it would solve only the cost problems of the Bureau in providing kosher food. Aside from the fact that it would do nothing to mitigate many of the other concerns raised by prison officials, the proposal is in fact fraught with the potential for seriously aggravating many of them. Thus, it is conceivable that disciplinary problems would result from the obvious economic discrimination that would result from such a system, as the economic inequalities among the inmate population would be clearly accentuated. (J.A. 431-34) In addition to the resentment this fact alone might generate, any perceived differences in the quality of prison and imported food would greatly exacerbate these tensions.

Security problems previously noted would of course be multiplied by the increased shipments of goods and the clear identification of the inmates for which each food item was intended. (J.A. 401) In the case of pre-wrapped foods like kosher dinners it might be possible to check the goods only upon their actually being opened for service.* The

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* In fact, opening frozen kosher dinners for any reason prior to actual service would under Jewish law render the food non-kosher.

possibilities for the passing of weapons or contraband would be legion. (J.A. 182, 184, 377-78)

Further, it must be recognized that if Jewish inmates were permitted to import or pay for kosher food, the Constitution would, in all likelihood, require that other groups be so permitted. (J.A. 401) Aside from the fact that the security and administrative problems attendant upon the operation of such a vast network of imports and payments would be geometrically increased, the aforementioned problems of prison discipline and order would be greatly exacerbated.

Finally, there might well be other constitutional problems with such a system in that the ability of an inmate in federal prison to practice his religion would thus be made to turn on his wealth. For all of these reasons, the government maintains that appellants' proposal is not a viable alternative to the present Bureau policy and might in fact cause even more difficulty within the prison environment than their request that the prison be required to provide kosher food.

3. The Bureau's Accommodation of Appellants' Religious Dietary Practices

In Pell v. Procunier, supra, 823-24, the Supreme Court upheld the Bureau of Prisons' flat ban on granting requests for press interviews of particular inmates by finding that whatever interference with the inmates' rights resulted from that policy were constitutionally cured by

the availability to those inmates of other means of communication, 417 U.S. at 824, thereby preserving their First Amendment freedoms. In this case too, aside from the constitutionally sufficient reasons for the Bureau's policy and hence the justification for any infringement of appellants' free exercise rights, there is an alternative available to them which will allow them to exercise their religious dietary practices, thus curing whatever interferences with their First Amendment rights an inflexible Bureau policy would impose.

As the evidence previously discussed makes clear, there are a large number of foods available in the regular prison food service of which appellants can and have partaken, without violating their kosher requirements, see supra at 5, (J.A. 89, 91, 94-104, 478-79). Moreover, many of these items are available in unlimited quantities. (J.A. 210-11) As the record also indicates, the Bureau has made a substantial effort to further accommodate the religious practices of these inmates by (1) providing them with dietary supplements consisting of eggs, cheeses and sardines (J.A. 373-75, 481-82), and (2) by assigning them to work in the kitchen where they could get extra portions of rationed items, (J.A. 102-3, 375), observe the preparation of foods, thus enabling them to eat foods they would otherwise have thought to be non-kosher, (J.A. 95), and to cook their own hot food in a religiously permissible manner. (J.A. 483-84). See supra,

at 6-7.*

The testimony of a nutritionist called by petitioners showed clearly that a diet consisting of the foods which petitioners could eat through the regular food service when supplemented in the manner described would supply them with a nutritionally sound diet,** (J.A. 294) providing them with recommended daily allowances of protein, (J.A. 284-85, 295) iron, (J.A. 302) and calories. (J.A. 286, 303-5) In addition, the Bureau provides vitamin and mineral pills, as needed, which would satisfy their nutritional requirements in those respects. (J.A. 301-2)

Contrary to appellants' suggestion that the government somehow seeks to force them to choose between their religious and nutritional needs, it is apparent that the Bureau has made every effort to accommodate those needs within the limitations of institutional demands. The availability of a nutritionally sound diet to inmates has always

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* It should be noted that the court determined that while on this diet, Smilow never complained to any prison official or doctor about any ill effects from this diet. (J.A. 501) Furthermore, while being transferred from New York to Ashland, he stayed in federal institutions in Lewisburg and Terre Haute. In each institution, and upon his arrival at Ashland, he was, like every arriving inmate, examined by a doctor. On all three occasions, he was found to be in good health and indicated no medical complaints. (Response of the Solicitor General, at 4).

** Appellants' claim that the lack of variety in such a diet would render it unpalatable over a period of time, even if true, would appear to involve a question of taste rather than matters of constitutional import. The record is clear than any reduced intake of such food would be simply a matter of personal choice and not of physical necessity. (J.A. 292-93) James Wahl confirmed the fact that such a diet would be nutritionally adequate, (J.A. 211) and also noted that due in part to the lack of variety in frozen kosher dinners, a steady diet of them would itself raise identical problems of palatability after two or three weeks of consumption. (J.A. 207-8)

been a factor which courts have looked to in deciding First Amendment claims like the instant one. If shown to be available, this fact standing alone has been deemed sufficient to compel rejection of such claims. In Abernathy v. Cunningham, 393 F.2d 775, 778 (4th Cir. 1968), despite adoption of a "compelling state interest" test, the Court of Appeals rejected identical free exercise claims holding:

> "At the hearing below Abernathy testified briefly that the Muslim faith prohibits the eating of pork in any form and that the penitentiary consistently serves pork, or food cooked in grease or lard. According to him, such tainted food is served so frequently that he would suffer from malnutrition should he attempt to abstain from pork through a process of individual selection. Prison authorities, however, testified to the contrary, maintaining that adequate nourishment could be obtained from a prison meal consisting solely of foods cooked without pork chosen from among the variety offered. They admit such a meal would perhaps not contain everything one might desire, but they insisted that it would provide a balanced ration. The district court so found, choosing to credit the testimony of the officials. Under the circumstances, the court determined that the prison was not required to provide a special diet and we agree."

The court in X(Bryant) v. Carlson, 363 F.Supp. 928, 931 (E.D. Ill. 1973) reached an identical result:

> "The prison is not required to provide a special diet to satisfy petitioners' religious beliefs, where, as is apparent here, sufficient nourishment can be obtained from the other foods available."

See also Walker v. Blackwell, supra, at 26, ("[I]n light of the present ability of the Muslims to sustain themselves without eating essence of swine, is another substantial reason for placing these minor restrictions on the practice

of the faith of Islam at the penitentiary."); Wilson v. Prasse, 463 F.2d 109, 112 (3rd Cir. 1972); see also Ross v. Blackledge, supra, at 619, where the court remanded the case for the taking of evidence, inter alia, on this issue.

Under the decision in Pell v. Procunier, and the cases specifically involving religious claims about prison diets, it is apparent that independently of any showing of the underlying governmental interests in the challenged practices, where, as here, it has been shown that a prison inmate can obtain a nutritionally adequate diet from the foods presently available to him within the institution by a process of self-selection, and in so doing adhere to his religious beliefs, the courts have rejected claims that the prison authorities were then required to make a special diet available to such inmates. The record in this case compels a similar result.

POINT II

THE DISTRICT COURT PROPERLY HELD THAT RICHARD HUSS DOES NOT ADHERE TO THE KOSHER DIETARY LAWS AND IN ANY EVENT IS NOT CONSTITUTIONALLY ENTITLED TO BE PROVIDED WITH KOSHER FOOD BY THE BUREAU OF PRISONS

It is the government's position that the United States is not constitutionally required to provide petitioners with kosher food in any event. In the case of Richard Huss, there is however, an additional but independent reason which compels this conclusion. Huss does not ordinarily follow kosher dietary requirements in any case and hence suffers no interference with his religious beliefs or practices as a result of the Bureau's failure to provide him with kosher food while he is in prison.

Upon being recalled to the stand on April 30, 1975, Huss acknowledged that although he "did not, outside prison adhere to the requirement of eating kosher food," if such food were made available to him in prison, he would eat it for religious reasons. (J.A. 493-494) Upon the basis of this testimony, counsel now contends "Huss is also entitled to have kosher food provided for him." (Appellants Brief at 48) Much more revealing, however, was the testimony which Huss gave when he first testified on April 1:

> "Q. Mr. Huss, are you yourself kosher, that is, practicing kosher?
> A. No; I'm not.
> Q. And that means that you eat non-kosher food?
> A. At times, yes."

* * *

Q. Mr. Huss, would it be fair to say that on literally countless occasions over the course of your life you have consciously violated the kosher dietary laws?
A. Yes." (J.A. 131-133)

When queried as to his reasons for following the same diet as Smilow during their incarceration pursuant to Judge Bauman's civil contempt order, Huss replied:

> "I felt that it was the right thing for me to do, simply because I knew that Mr. Smilow was serious in his dietary laws, and I felt that it would be in his best interests as well as mine to support him." (J.A. 133)

On the basis of this testimony, the District Court rejected Huss's claim that he was constitutionally entitled to kosher food, noting simply that by his own testimony, he is not an observer of the kosher dietary requirements. (J.A. 507)

Appellants now claim, however, that on the basis of his testimony on April 30, Huss has "changed" his religious practices and hence is entitled to kosher food.* Further, this decision is claimed to be one of personal conscience and hence not subject to governmental scrutiny except as to its bona fides. Without conceding the validity of counsel's reading of the case law, the government contends that Huss's claims are simply not bona fide and that there is abundant evidence from which this conclusion can be drawn.

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* There is also the strange implication in Appellants' Brief that somehow, the fact that Huss testified truthfully in court previously by not claiming to hold "dogmatic religious beliefs" is a factor which the court should consider in determining the bona fides of his recent conversion. (Appellants' Brief at 49).

First, and most obviously, the alleged change in his religious practices occurred only once judicial proceedings were underway to determine his entitlement to such food. There was no indication in his testimony on April 1 that Huss wished to practice kosher and abundant evidence that he had voluntarily chosen not to. Even more telling is the fact that Huss's change on April 30 occurred only after the government in a Memorandum in Opposition submitted on April 12, (J.A. 17-66) pointed out that certain constitutional rights are personal rights which cannot be asserted on another's behalf, Tileston v. Ullman, 318 U.S. 44, 46 (1943); California Bankers Ass'n v. Shultz, 416 U.S. 21, 51, 55-56 (1974), and therefore that Huss, having suffered no infringement of his own religious freedom, lacked standing to challenge the Bureau's policy regarding kosher food. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972). (J.A. 25-27)

Further doubt is cast upon petitioner's alleged change in practices by the fact that even after his testimony of April 30, when the District Court issued its opinion and denied interim relief pending appeal, application was made to this Court on May 20 for an order granting interim relief only to Smilow and not to Huss. (J.A. 538) Therefore, while the government is firmly of the view that the Bureau is not constitutionally required to provide kosher food to petitioners in any event, there are additional reasons compelling such a conclusion in the case of Richard Huss, namely that the Bureau's policy does not in fact infringe upon his religious practices.

SJG:n

POINT III

THE DISTRICT COURT LACKED JURISDICTION TO HEAR THE MOTION FOR REVIEW OF THE MANNER OF EXECUTION OF THE SENTENCE.

In the instant proceeding, the appellants do not challenge, in any respect, the nature or terms of the sentence itself, nor any aspect of the trial or sentencing procedure. Their attack relates purely to the manner in which the Bureau of Prisons will execute their sentences, and particularly the manner in which the Bureau administers Policy Statement 7300.43B relating to accommodation of dietary preferences of inmates. Although they were sentenced in the Southern District of New York, they are now imprisoned in Ashland, Kentucky. The District Court, given such a petition or motion, was without jurisdiction to entertain the application or grant the requested relief.*

28 U.S.C. § 2255

Appellants here contend that the instant application be treated as a motion under 28 U.S.C. § 2255 to vacate or correct a sentence, as was done by Judge Weinstein in Kahane v. United States, supra. This jurisdictional basis

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* While the jurisdictional issue was not briefed below, it was raised sua sponte by the Court of Appeals on the request for a stay herein.

must fail. The courts have consistently held the distinction between execution and imposition to be controlling in the application of Section 2255; an attack on the action of prison authorities is not a proper use of Section 2255. Mordecai v. United States, 421 F.2d 1133, 1139-40 (D.C. Cir. 1969), cert. denied, 397 U.S. 977 (1970); Stinson v. United States, 342 F.2d 507, 508 (8th Cir. 1965); Freeman v. United States, 254 F.2d 352, 353-54 (D.C. Cir. 1958); Costner v. United States, 180 F.2d 892 (4th Cir. 1950); McClure v. United States, 374 F.Supp. 946 (S.D.N.Y. 1974); Halprin v. United States, 293 F.Supp. 1186 (S.D.N.Y. 1968) see D'Allesandro v. United States, __ F.2d __, Slip op. at 3387, 3398-3400 (2d Cir. May 1, 1975).

> "It is well settled that a motion to vacate sentence is available only to collaterally attack the validity or imposition of a sentence and that an attack upon the execution of sentence may only be made by means of habeas corpus or mandamus in the district of confinement." McClure v. United States, supra. 374 F.Supp. at 949.

In Kahane, Judge Weinstein, notwithstanding his findings, implicitly recognized the above distinction, stating that the sentencing court may "correct the denial of a constitutional right violated by the imposition of the sentence itself." (Emphasis added.) United States v. Kahane, supra, Opinion at p. 20, 22.

The attempt to broaden the scope of Section 2255 based on Hill v. United States, 368 U.S. 424, 426-27 (1962), fails upon close scrutiny. Hill, which has dictum equating the § 2255 relief to habeas relief, involved a failure of the sentencing judge

to comply with Rule 32(a), Fed.R.Crim.Proc.. More revealing is the decision in United States v. Hayman, 342 U.S. 205 (1952), relied on by the court in Hill, which contains a lengthy analysis of the legislative history of § 2255 by Chief Justice Vinson. Section 2255, in affording a remedy similar to habeas to be brought in the sentencing court, was fundamentally designed to avoid practical difficulties in habeas hearings in the district of confinement particularly where the record with regard to the illegality of sentence, arising from trial, was most readily available to the sentencing judge. United States v. Hayman, supra, 342 U.S. at 212-219; see Kaufman v. United States, 394 U.S. 217, 221-22, n. 5, 226, 229 (1969); United States v. Smith, 337 F.2d 49, 52-53 (4th Cir. 1964) cert. denied, 381 U.S. 916 (1965). The integrity of the trial or sentencing here are not in question; the instant case cannot be brought under Section 2255.

Further, to suggest, as Judge Weinstein does, that Section 2255 applies because "it was obvious to the sentencing court at the time of sentencing that defendant's dietary requirements, if ignored, would create a serious constitutional issue", United States v. Kahane, supra, Opinion at 23, only begs the question and would subject the courts to numerous pre-confinement challenges relating to prison administration which would delay imprisonment, a concept clearly not intended by Congress. Under such a concept, the mail censorship regulations attacked in Procunier v. Martinez, supra, could have been attacked prior to confinement since, if raised, they would have been as obvious to the court as they were to the

class in Martinez. The delays in confinement which would be imposed by such lengthy hearings prior to confinement, and unrelated to the legality of the trial or sentencing itself, were not intended by Section 2255.*

Other Jurisdictional Claims

Appellants cite Rule 35, Fed.R.Crim.Proc. as a jurisdictional basis for a motion to correct an "illegal sentence". There is nothing whatever in the rule or its history to suggest that it was to provide a jurisdictional basis for attacks on the manner in which the prison authorities administer or execute the sentence, as opposed to illegality in the sentence itself. See United States v. Bradford, 194 F.2d 197, 200-01 (2d Cir. 1952) (L. Hand, C.J.), cited with approval in United States v. Morgan, 346 U.S. 502, 506 n. 5 (1953).

* In the instant case, the delays from a prolonged hearing, with testimony concerning policy and administrative practice in New York and Ashland, Kentucky, are obvious, and make clear the difficulties in determining in advance the manner in which a given facility may attempt to accommodate appellant's dietary preference and the alternatives available. Cases cited by Judge Weinstein in Kahane on the appropriateness of an evidentiary hearing under § 2255 all involved post-confinement challenges to the validity of prior proceedings before the sentencing judge. United States v. Corlino, 400 F.2d 56 (2d Cir.), cert. denied, 394 U.S. 1013 (1968); Mirra v. United States, 379 F.2d 782,787-88 (2d Cir.), cert. denied, 389 U.S. 1022 (1967); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961).

SJG:n

Cases cited by appellants relating to the applicability of the "cruel and unusual punishment" clause of the Eighth Amendment to federal prison conditions are simply inapposite to the instant jurisdictional claim; such cases merely deal with the applicability of such alleged violations to separate actions by prisoners under the federal civil rights acts, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. See Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973); Holt v. Sarver, 442 F.2d 304, 307 (8th Cir. 1971); Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y. 1974), aff'd in part, rev'd in part, 507 F.2d 333 (2d Cir. 1974).

Although appellants have not here asserted jurisdiction on the basis of habeas corpus or mandamus, any such claims would also fail. They have not brought a petition for habeas corpus, nor could they in a district other than their place of confinement. See McClure v. United States, supra, and cases cited therein. Equally, mandamus under 28 U.S.C. § 1361 must involve an action to compel a particular officer to perform a duty rather than a collateral attack on a sentence. Hospoder v. United States, 209 F.2d 427, 429-30 (3d Cir. 1953); McClure v. United States, supra; cf., Cortright v. Resor, 447 F.2d 245, 250-51 (2d Cir. 1971), cert. denied sub nom., Cortright v. Froehlke, 405 U.S. 965 (1972). and in addition would be subject to a prior requirement to exhaust administrative remedies. Waddell v. Alldredge, 480 F.2d 1078 (3d Cir. 1973); Paden v. United States, 430 F.2d 882 (5th Cir. 1970).

CONCLUSION

For the reasons set forth above, the order of the District Court should be affirmed.

Dated: New York, New York

June 9, 1975

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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CA 75-1192

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

JERRY L. SIEGEL being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 9th day of June 1975 he served a copy of the within Government's brief (respondent appellee), affidavit and motion by placing the same in a properly postpaid franked envelope addressed:

1) Nathan Lewin, Esq., Messrs. Miller, Cassidy, Larroca Lein, 2555 M Street N.W. Washington, D.C. 20037
2) Dennis Rapps, 66 Court St. Brooklyn, NY 11201

And deponent further says he sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Patrick H. Barth

Jerry L. Siegel

Sworn to before me this

9th day of June 1975

PATRICK H. BARTH
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4526297
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976